STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
TAJMAH L. PAYTON,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2006CF1734
	)	EEOC NO(S): N/A
and	)	ALS NO(S): 07-584
	)	
UNITED STATES CELLULAR CORPORATION,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8b-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 23rd day of August 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
TAJMAH L. PAYTON,	)	
	)	
Complainant,	)	**ALS NO.: 07-584**
	)	**CHARGE NO.: 2006CF1734**
v.	)	**EEOC NO.: N/A**
	)	
UNITED STATES CELLULAR CORPORATION,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is before me on Respondent's motion for summary decision. Respondent filed its motion along with affidavits and exhibits on July 25, 2008; Complainant filed a response to the motion along with exhibits on March 17, 2009 and Respondent filed a reply on April 20, 2009.

The Illinois Department of Human Rights is an additional statutory agency that has issued state actions in this matter and is, therefore, named herein as an additional party of record.

CONTENTIONS OF THE PARTIES

Respondent contends that this matter must be dismissed because the undisputed facts show that Complainant was not subjected to gender discrimination. Complainant contends that issues of fact remain as to her claims of gender discrimination and as to whether Respondent's articulated reason for discharging her was pretext for gender discrimination.

FINDINGS OF FACT

The following facts were derived from uncontested facts in the record and were not the result of credibility determinations. All evidence was viewed in the light most favorable to Complainant.

1. Respondent is a business that sells wireless communication services.

2. Complainant is female.

3. Respondent hired Complainant as a Wireless Business Consultant (WBC) on February 21, 2005. As a WBC, Complainant was responsible for selling Respondent's services to businesses.

4. Respondent hired Mike Rarrat, male, as a WBC on March 23, 2002. As a WBC, Rarrat was responsible for selling Respondent's services to businesses.

5. Gregory Nelson, male, was hired by Respondent as Business Sales Manager on July 11, 2005. Nelson was Complainant's and Rarrat's immediate supervisor from July 11, 2005. Nelson reported directly to the Director of Business Sales, Dana Dorcas (male).

6. Timeka Young was Associate Relations Representative during Complainant's employment with Respondent. Young provided human resources support for the business sales department where Complainant and Rarrat worked.

7. As WBC's, Complainant and Rarrat were required to meet the expectations set forth in Respondent's Sales Productivity and Accountability Plan (SPAP) for sales performance. Pursuant to the SPAP, WBC's were required to sell a threshold of 75% of their assigned quota of voice activations per quarter. For WBC's, the SPAP provided: First Incident-One full quarter below threshold from rolling twelve (12) month plan results in written notification and counseling and may lead to termination. Second Incident-Two full quarters below threshold in rolling twelve (12) month plan results in termination.

8. Complainant received a copy of the SPAP and signed an acknowledgement on April 7, 2005, indicating that she understood that she was bound by it.

9. Newly hired WBC's are not held accountable for the quota requirement until they complete their first full quarter of employment, referred to as the "guarantee period."

10. Complainant was not held accountable for a sales quota for the first and second quarters of 2005. For the third quarter, Complainant achieved 67% of her assigned quota; for the fourth quarter, Complainant achieved 46% of her assigned quota.
11. Complainant received a written warning on October 10, 2005, for failing to meet her minimum performance requirement for the third quarter.
12. Complainant was discharged on January 4, 2006, after failing to achieve 75% of her assigned quota for the second consecutive quarter
13. For the 2005 year, Rarrat achieved 176% of his assigned quota the first quarter; 84% of his assigned quota the second quarter; 110% of his assigned quota the third quarter; and 65% of his assigned quota the fourth quarter. Rarrat received a written warning on February 3, 2006, for failing to meet his minimum performance requirement for the fourth quarter.

CONCLUSIONS OF LAW

1. The Illinois Human Rights Commission has jurisdiction over the parties and subject matter of this Complaint.
2. Respondent is an employer as defined by section 5/2-101(B)(1) of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*
3. Complainant is an aggrieved party as defined by section 5/1-103(B) of the Act.
4. This record presents no material issues of fact as to Complainant's gender discrimination claims.
5. This record presents no genuine issues of fact as to whether Respondent's proffered reasons for discharging Complainant were pretext.

DETERMINATION

Respondent is entitled to summary decision in its favor.

DISCUSSION

Complainant's motion to strike "Declarations" attached to Respondent's motion for Summary Decision

Complainant filed a motion to strike Respondent's declarations attached to its motion for summary decision. Respondent filed a response to the motion. Complainant moves to strike the declarations of Gregory Nelson and Timeka Young attached to Respondent's motion. Complainant argues that the statements are improper as they are not properly sworn and are not made on the personal knowledge of the declarants. Respondent defends its declarations as having been made and certified pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure and as properly stating that the assertions are made on the personal knowledge of the respective declarants.

Upon review of the declarations of Nelson and Young, I find them both to affirmatively state that the assertions contained therein are made upon the personal knowledge of the respective declarants and I further find them both to be properly verified by certification pursuant to 735 ILCS 5/1-109 of the Illinois Code of Civil Procedure. Therefore, I find the declarations to be competent, admissible evidence for purposes of this summary decision motion. Complainant's motion is denied.

Respondent's motion for summary decision

The Complaint, which consists of the *Charge of Discrimination*, presents three separate counts of gender-based discrimination. Count I alleges that Complainant was subjected to unequal terms and conditions of employment from September 1, 2005, through January 4, 2006, based on her gender, female. Count II alleges that Complainant received a negative performance evaluation on October 10, 2005, based on her gender. Count III alleges that Complainant was discharged on January 4, 2006, based on her gender.

A Complainant bears the burden of proving discrimination by the preponderance of the evidence. Section 5/8A -102 (I) (1) of the Act. That burden may be satisfied by direct evidence that adverse action was taken for impermissible reasons or through indirect evidence in accordance with the method set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 93 S.

Ct. 1817 (1973), and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089 (1981). This method of proof has been approved by the Illinois Supreme Court and adopted by the Commission in *Zaderaka v. Illinois Human Rights Commission*,131 Ill. 2d 172, 545 N.E.2d 684 (1989).

Under this three-step approach, a complainant must first establish a *prima facie* case of unlawful discrimination. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action. Once the respondent successfully makes this articulation, the presumption of unlawful discrimination drops and the complainant is required to prove, by a preponderance of the evidence, that the respondent's articulated reason is a pretext for unlawful discrimination.

Complainant (female) was hired as a Wireless Business Consultant (WBC) for Respondent on February 21, 2005. In this position, Complainant was responsible for selling Respondent's services to businesses. From July 11, 2005, until she was terminated on January 4, 2006, Complainant's direct supervisor was Business Sales Manager, Greg Nelson (male). Nelson reported directly to the Director of Business Sales, Dana Dorcas (male). At all relevant times, Timeka Young, Associate Relations Representative, provided human resources support for the business sales department where Complainant worked.

Unequal terms and conditions of employment based on gender

First, Complainant alleges that she was subjected to unequal terms and conditions of employment from September 1, 2005, through January 4, 2006, because of her gender. Complainant's presents no evidence to support a direct case of discrimination; therefore, Complainant's case must be analyzed according to the *McDonnell Douglas, Burdine* three-step approach.

In order to prove a *prima facie* case of unequal terms and conditions of employment based on gender, Complainant must show that: (1) she is a member of the protected class; (2) she was performing her job duties according to Respondent's legitimate expectations; (3) she

suffered an adverse employment action; and (4) other individuals not within her protected class were treated more favorably. *Muhammad and Walsh/Traylor/McHugh*, IHRC, ALS No. 9466, March 13, 2002.

The first element is undisputed. Complainant is female and in the protected class. However, the undisputed facts prevent Complainant from showing any ability to make out the remaining three elements of her *prima facie* case. According to Complainant, she was subjected to the following adverse employment actions by her male supervisor, Nelson: (a) On or around September 1, 2005, Complainant and a co-worker, Chris Mancilla, serviced a customer's phone lines together. After it was determined that the phone lines were not operating properly, Nelson accused Complainant of not taking care of the customer properly; however, Nelson did not accuse Mancilla of not taking care of the customer properly. (b) On or around September 30, 2005, Nelson refused to address Complainant's complaints that a co-worker, Phil Brumant, male, was stealing leads that were in Complainant's territory. Nelson was aware of the situation and suggested that Complainant speak to Brumant about the situation and that Brumant and Complainant split the lead. (c) Nelson regularly closed his office door and pretended he was busy in order to avoid Complainant. (d) During her weekly one-on-one meetings with Nelson, Nelson would leave Complainant to attend to the needs of other male co-workers and Nelson would not treat other male co-workers in this manner. (e) Nelson would reschedule weekly team meetings if male co-workers could not attend; however, if Complainant could not attend the meeting, she was directed to participate via conference call. (f) Similarly situated male co-workers were not required to keep a telephone call log sheet as was Complainant. (g) Nelson extended lunch invitations to male co-workers to the exclusion of Complainant. (h) Nelson invited male co-workers Michael Johnson and Nick Petsche to a networking event in downtown Chicago and failed to invite Complainant. (i) Complainant complained to Director Dana Dorcas that Nelson was treating her differently than the male co-workers and Dorcas spoke to Nelson, but the mistreatment continued.

Respondent argues that these allegations do not constitute materially adverse employment actions under the Act. Respondent points to the decision in *Canady and Caterpillar, Inc.*, IHRC, ALS No. S8795, March 17, 1998 as standing for the proposition that an adverse act must consist of a material change in the terms or conditions of employment in order to be actionable under the Act. Respondent characterizes Complainant's allegations as *minor slights* and *petty complaints* concerning working conditions common to every work environment that are not actionable under Section 2-102(A) of the Act. I agree. As pointed out by Respondent, Complainant's allegations of her supervisor's conduct falls short of demonstrating any adverse effect on her pay, discipline or job duties. Respondent quotes from the decision in *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605 613 (7th Cir. 2001), where the court noted that, "not everything that makes an employee unhappy is an actionable adverse action...otherwise minor and even trivial employment actions that an ...employee did not like would form the basis of a discrimination suit."

Such workplace incidences of the kind alleged by Complainant fall easily, either individually or collectively, within the category of *minor slights* concerning job assignments and working conditions which the Commission and the courts have found to be non-actionable under Section 2-101(A) of the Act and under similar provisions pursuant to federal discrimination law under Title VII. See, for example, *Campion v. Blue Cross and Blue Shield*, IHRC, ALS No. 4577, June 27, 1997 (the Act does not protect individuals against every adverse thought, procedure or action; the adverse action must be sufficiently severe or pervasive); *Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274* (7th Cir. 1996) (every trivial personnel action cannot form the basis of a discrimination suit); and *Rabinovitz v. Pena, 89 F.3d 482, 488* (7th Cir. 1996)(a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an insignificant alteration of job duties and might be indicated by a termination of employment, a demotion evidenced by a decrease in salary, a less distinguished title, a material loss of benefits, or significantly diminished material

responsibilities). These allegations as stated by Complainant simply do not rise to the level of adverse actions that are actionable under the Act.

Negative Performance Evaluation on October 10, 2005 and Discharge on January 4, 2006

The facts underlying Counts II and III are identical, thus, these two counts are analyzed together. Complainant alleges that she was given a negative performance evaluation and discharged and that a co-worker, Mike Rarrat, male, had comparable job performance and was not given a negative performance evaluation nor was he discharged.

Here, again, Complainant has the burden to prove a *prima facie* case of unequal terms and conditions of employment based on gender. To meet this burden, Complainant must show that (1) she is a member of a protected class, (2) she was treated in a particular manner by Respondent, and (3) similarly situated employees outside her protected class were treated more favorably. *Turner-Hiner and Illinois Children's School and Rehabilitation Center*, IHRC, ALS No. 6170, July 2, 1997; *Moore and Beatrice Food Co.*, IHRC, ALS No. 2141, May 12, 1988.

For the first two elements of her *prima facie* case here, Complainant points to a written memorandum she received on October 10, 2005, notifying her that she had failed to meet her minimum performance requirement for the third quarter, 2005, and to her discharge on January 4, 2006. Complainant maintains that Rarrat had a similar performance record and was not issued a warning nor discharged.

Respondent argues that Complainant fails to establish the third element of her *prima facie* case here because Rarrat is not similarly situated to Complainant, nor was he treated more favorably than Complainant since Rarrat's job performance was not comparable to Complainant's. In support of its argument, Respondent presents the signed declaration of Nelson, who states that he supervised Complainant and Rarrat since July 11, 2005, in their respective positions as WBC's. Nelson describes the relevant performance policy that applied to Complainant and Rarrat at the relevant time. Nelson states that all WBC's were required to

meet a minimum of 75% of their assigned quota per quarter and that those who did not meet this standard for one quarter would receive a written warning. Those who did not meet this standard for two quarters in a rolling twelve-month period would be discharged. Nelson states that Complainant only achieved 67% of her quota in her first accountable quarter, which was the third quarter of 2005, prompting him to issue Complainant the October 10, 2005, warning in accordance with the SPAP. Nelson further states that Complainant achieved 40.6% on her very next quarter, which performance prompted him to discharge her effective January 4, 2006, in accordance with the SPAP.

Timeka Young, Associate Relations Representative for Respondent, also submits a signed declaration, which corroborates Nelson's assertions. Young says she provided human resources support to the business to business sales department where Complainant and Rarrat worked as WBC's and that she is one of the custodians for personnel records for employees in the business sales department where Complainant and Rarrat worked. Young presents a table of sales records for Complainant and Rarrat for the 2005 year. The table indicates that Complainant was hired on February 21, 2005 and was not held accountable for a sales quota for the first and second quarters of 2005. For the third quarter, the table shows that Complainant achieved 67% of her quota; for the fourth quarter, the table shows that Complainant achieved 46% of her quota.

For Rarrat, the table indicates that, for 2005, he achieved 176% of his quota the first quarter; 84% of his quota the second quarter; 110% of his quota the third quarter; and 65% of his quota the fourth quarter. Both Nelson and Young assert that Rarrat received a written warning on February 3, 2006, for failing to achieve his fourth quarter standard.

Complainant's response to the motion consists of an unsigned, unsworn narrative that fails to address any of the specific facts in Respondent's motion. Complainant submits nothing to refute the sworn assertions of Nelson and Young as to the sales performances of Rarrat and Complainant or as to the issuance of written warnings to Rarrat and Complainant for 2005.

Therefore, these assertions must be accepted as true. *Koukoulomatis v. Disco Wheels,* 127 Ill.App.3d 95, 468 N.E.2d 477 (1st Dist 1984).

While it cannot be said that Rarrat was not similarly situated to Complainant on these facts, the undisputed facts support that Rarrat was not treated more favorably than Complainant as he was also issued a written warning for failing to meet his quarterly goal for the one time in 2005 and this record presents no evidence to support that Rarrat, like Complainant, failed to meet his quota for two successive quarters.

Therefore, Complainant cannot establish that similarly situated employees outside her protected class were treated more favorably and her *prima facie* case as to Counts II and III fails.

Pretext

Under Commission precedent, it is possible for a complainant to prevail without establishing a *prima facie* case if the complainant can establish that Respondent's articulated reason for its employment decision was pretextual. *Clyde and Caterpiller, Inc.*, IHRC, ALS No. 2794, Nov. 13, 1989, aff'd *Clyde v Human Rights Commission*, 206 Ill App 3d 283, 564 N.E.2d 265 (4th Dist 1990). Therefore, if Complainant here can raise a genuine issue of fact on the issue of pretext, Respondent's motion must be denied.

Respondent's articulated reason for discharging Complainant was that Complainant failed to meet her established quota for two successive quarters. Complainant presents absolutely nothing in the form of admissible evidence from which to reasonably infer that Respondent's articulated reason for its employment decision was pretext for gender discrimination.

This matter is being considered pursuant to Respondent's motion for summary decision. A summary decision is analogous to a summary judgment in the Circuit Court. *Cano v. Village of Dolton*, 250 Ill. App. 3d 130, 620 N.E.2d 1200 (1st Dist 1993). A motion for summary decision is to be granted when the pleadings, depositions, exhibits and affidavits on file reveal that no

genuine issue of material fact exists and establish that the moving party is entitled to judgment as a matter of law. See, Section 5/8-106.1 of the Illinois Human Rights Act (Act), 775 ILCS 5/1-101 *et seq.*, and *Young v. Lemons*, 266 Ill. App. 3d 49, 51, 203 Ill. Dec. 290, 639 N.E.2d 610 (1st Dist. 1994). In determining whether a genuine issue of material fact exists, the record is construed in the light most favorable to the non-moving party, and strictly against the moving party. *Gatlin v. Ruder*, 137 Ill. 2d 284, 293, 148 Ill. Dec .188, 560 N.E.2d 586 (1990); *Soderlund Brothers, Inc., v. Carrier Corp.*, 278 Ill. App. 3d 606, 614, 215 Ill. Dec. 251, 663 N.E.2d 1 (1st Dist. 1995). A summary order is a drastic method of disposing of a case and should be granted only if the right of the moving party is clear and free from doubt. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill.2d 263, 271, 166 Ill. Dec. 882, 586 N.E.2d 1211; *McCullough v Gallaher & Speck*, 254 Ill. App. 3d 941, 948, 194 Ill. Dec. 86, 627 N.E.2d 202 (1st Dist. 1993).

Although Complainant is not required to prove her case to defeat the motion, she is required to present some factual basis that would arguably entitle her to a judgment under the law. *Brick v City of Quincy*, 241 Ill. App. 3d 119, 608 N.E.2d 920, 181 Ill. Dec .669 (4th Dist. 1993) citing, *inter alia, West v Deere & Co.*, 145 Ill. 2d. 177, 182, 164 Ill. Dec. 122, 124, 582 N.E.2d 685, 687 (1991).

This record presents no material issues of fact as to Complainant's claims of gender discrimination; thus Respondent is entitled to summary decision on all counts. Due to this decision, the previously scheduled November 10, 2009, status date is hereby stricken.

RECOMMENDATION

Accordingly, I recommend that the Complaint and underlying Charges be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

November 4, 2009

SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section